No. 85-5915

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER individually and on behalf of all persons similarly situated

Petitioners

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THAT THE FOURTH CIRCUIT'S DECISION REDUCES HUD REGULATIONS TO UNENFORCEABLE "GUIDELINES" IS A REASON FOR THIS COURT TO GRANT RATHER THAN DENY REVIEW.

The Authority's brief in opposition to the writ of certiorari makes explicit what is only implicit in the Court of Appeals' treatment of this case: the view that duly published regulations of the Department of Housing and Urban Development are not law at all. The Authority is concerned that courts may take such regulations "literally" (brief in opposition p. 7, fn.6). Actually, says the Authority, regulations such as those in question here are only issued so that HUD may "engage in continuing dialogue with the States and tenants," and listen to "their comments and complaints with regard to the feasibility - or lack thereof - of Department regulations." HUD's authority would be severely undermined if tenants could actually hold local housing officials to what HUD has promulgated. (Brief in opposition p. 7)

The Authority's characterization is only slightly more extreme than that of the Court of Appeals itself, which described HUD as the sole "enforcer" of the Housing Act, speculating that consolidated enforcement responsibility

> was a practical legislative attempt to protect the limited resources available to the government. In other words, HUD can act as a screening body and focus its attention on those housing developments sorely needing attention without risking the depletion of funds available for redressing violations of the Housing Act.

(Petitioners' appendix A6, n.7).

In short, having created clear regulations describing what local authorities must do to comply with the mandate of Congress, HUD may disregard compliance, and in fact is to be expected to do so in order that the agency can thereby concentrate on more important matters. This view of the Code of Federal Regulations and the unlimited discretion of HUD is a radical departure which goes far beyond a recognizable counsel of judicial restraint. Law is law, and not just the parts we

like. HUD regulations are the law, Thorpe v. Housing Authority of Durham, 393 U.S. 268, 274-76 (1969), just like HEW's AFDC regulation in Batterton v. Francis, 432 U.S. 416, 425-26 (1977) or the Armed Services Procurement Regulation in Paul v. United States, 371 U.S. 245, 252-55 (1963). And not only housing authorities and tenants but HUD as promulgating agency is bound by its own regulations while in effect, Service v. Dulles, 354 U.S. 363 (1957).

It should come as no surprise that a blatant violator of regulations should have a low opinion of the regulations violated; but it is surprising that the Authority would expect the courts to find them less than binding. Surely the very first holding that HUD has exclusive jurisdiction over all questions arising under the Housing Act of 1937 should not arise from a case manifesting the unwillingness of the agency to perform the task.[1] Here violation of those regulations not only shows the inadequacy of HUD oversight but directly imperils the critical Congressional policy of the Brooke Amendment rent limits. No abstract discussion of the nature and enforcement of agency regulations, however, can excuse the basic failing of the Fourth Circuit's opinion: its utter lack of analysis of the Brooke Amendment and implementing regulations. The disturbing tendencies in the announced principles of decision rise to alarming and radical error when applied so casually to this statutory context. The brief in opposition only emphasizes the importance of the case and of this Court's review.

II. THIS CASE IS NOT AN AN INDIVIDUAL GRIEVANCE ABOUT FREE ELECTRICITY, BUT CONCERNS A SWEEPING DISREGARD OF STATUTORY MANDATE.

This case cannot fairly be characterized as a quest for "free electricity." (Opposing brief at 6,8,9). The 1100 affected tenant families pay up to the Brooke Amendment limit in rent, and the rent must include a reasonable allowance of utilities. The balance of cost for both rent and utilities is subsidized to the Authority by HUD. There is nothing free to anyone; the question is whether the Authority can charge tenants beyond the Brooke Amendment limits, and retain the illegally extracted charges. Neither court below, it should be noted, has accepted the Authority's mislabeling of the issue as "free electricity."

Nor has the District Court or the Court of Appeals accepted the Authority's attempt to characterize this case as an "individual grievance" (brief in opposition, pp. 6, 7-9). Both the initial complaint and every shred of fact in evidence support the tenants' assertion that the Authority's whole system of utility allowances defies the Brooke Amendment, the HUD regulations, and the Authority's lease. The District Court recognized the case as appropriate for class treatment on both grounds of common law and fact (appendix A26).

The Authority (opposing brief n. 9) would consign these 1100 tenant families to the individual administrative grievance process operated by the Authority, overlooking the specific finding by HUD that this grievance process is unavailable for challenges to utility allowances. HUD Regulation Comments, 49 Fed. Reg. 31399, 31407 (August 7, 1984). In the alternative, the Authority argues that 1100 individual claims involving highly technical computations and construction of federal regulations are "landlord-tenant disputes of a nature traditionally and properly left to the jurisdiction of the state courts." (Opposing brief p.8). The shortcomings of this approach are self-evident, whether it is viewed as a question of federalism, judicial efficiency, or common sense.

This case, in short, has nothing to do with highly individualized grievances, but rather with uniform and obstinate Authority dereliction. The judicial treatment to date imperils the key Congressional mandate of the entire

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[1] As petitioners pointed out in their opening brief (p.7), HUD has not asserted a sole enforcement role concerning Brooke Amendment and utilities violations.

public housing program, and a vast number of the poorest people in the nation. Where magnitude of error is so compounded by magnitude of effect, this Court's review is thoroughly warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this reply to the brief in opposition was served by deposit in the United States mail, first class postage prepaid, addressed to Bayard E. Harris, Esq., counsel for respondent, Woods, Rogers & Hazelgrove, P. O. Box 720, Roanoke, Virginia 24004, on December 30, 1985.

Of counsel for petitioners